Filed 4/5/19 Milton v. Kings County Personnel Appeals Bd. CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TY MILTON,

Plaintiff and Appellant,

v.

KINGS COUNTY PERSONNEL APPEALS BOARD,

Defendant and Respondent,

COUNTY OF KINGS,

Real Party in Interest and Respondent.

F075453

(Kings Super. Ct. No. 16C0096)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. H.N. Papadakis, Judge.*

Bennett, Sharpe, Delarosa, Bennett & LiCalsi, and Eric J. LiCalsi for Plaintiff and Appellant.

Colleen Carlson, County Counsel, and Annureet K. Grewal, Deputy County Counsel, for Defendant and Respondent and Real Party in Interest and Respondent.

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* Retired judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Appellant Ty Milton worked as a deputy sheriff in Kings County for about 19 years before resigning effective November 7, 2015. Milton was also a member of the Kings County Deputy Sheriff's Association (DSA). A memorandum of understanding (MOU) between the DSA and Kings County (County) was executed in August 2013. This MOU was in effect from August 13, 2013, and July 31, 2016.

Article 10 of the MOU outlined a "Grievance Procedure" to provide for "systematic consideration of an individual employee's grievance." The MOU created a Personnel Appeals Board to hear grievances pursuant to Kings County's personnel rules.

The MOU identified several "procedural steps" of the grievance process. First the employee should discuss the matter informally with their immediate supervisor. If that does not result in a mutually acceptable solution, the employee must submit the grievance in writing to their supervisor's superior. After a formal hearing, at which the employee may be accompanied by a representative, the supervisor's superior must render a written decision. If the employee is dissatisfied with the written decision, the employee may present the grievance to their "department head," who would then issue his or her own written decision. If the employee is again dissatisfied, he or she may present the grievance to the Personnel Appeals Board.

In 2015, a grievance arose. The parties do not describe the details of the dispute, presumably because it has little bearing on the issues presented in this appeal. Broadly put, appellant believed he could elect to receive a particular postemployment benefit[1] in the form of continuing a portion of his health benefit, rather than as a cash payout.

Appellant discussed the issue with unnamed "officials" of the County. The officials indicated appellant was only eligible to receive the benefit as a cash payout. A lawyer with the DSA then sent a formal, written grievance to the human resources director of Kings County. The human resources director concluded in writing that

[1] The benefit is described in Article 23 of the MOU.

appellant was not eligible for the "retiree health benefits" granted by Article 23 of the MOU. Appellant then requested in writing that the grievance be presented to the Personnel Appeals Board.

The Personnel Appeals Board held a hearing on January 12, 2016, with witness testimony and documentary evidence. On January 25, 2016, the Personnel Appeals Board decided against appellant. In a letter to DSA's counsel dated January 27, 2016, the Personnel Appeals Board provided a copy of its official decision. The letter also contained the following text:

> "Notice to the Parties: Decisions of the Appeals Board are final and binding unless appealed in accordance with section 1060 of the Personnel Rules, which has been included for your reference. The time within which either party may seek judicial review of this decision is governed by Section 1094.6 of the California Code of Civil Procedure."

The letter enclosed a copy of the decision, the last page of which had the following text:

> "As per Kings County Personnel Rule
>
> "*1060 Board of Supervisors Review*
>
> *"If either party so desires, the decision of the Board may be submitted for consideration by the Board of Supervisors. The action of the Board of Supervisors shall be final and binding. Requests for review shall be made in writing within ten (10) working days from the date of the Appeals Board decision. The Board of Supervisors shall consider the request at their next regularly scheduled meeting or one that is mutually acceptable to both parties.*
>
> "*NOTICE TO THE PARTIES:*
>
> *"The time within which either party may seek judicial review of the final decision is governed by Section 1094.6 of the California Code of Civil Procedure.*"

Important here, appellant did not submit the issue to the Board of Supervisors. Appellant filed the present action in Kings County Superior Court on April 19, 2016.

Respondent filed a demurrer, contending appellant failed to exhaust his administrative remedies because he did not submit the grievance to the Board of Supervisors. The court sustained the demurrer with leave to amend.

Appellant filed an amended petition for writ of mandate and again respondent filed a demurrer on the ground appellant failed to exhaust his administrative remedies. The court sustained the demurrer without leave to amend, and subsequently entered a judgment of dismissal. Appellant appeals the judgment. We affirm.

DISCUSSION

I. Administrative Procedure to Seek Review by the Board of Supervisors Pursuant to Personnel Rule 1060 was not "Wholly Inadequate" so as to Excuse Failure to Exhaust all Administrative Remedies

A. Law

1. Standard of Review

" ' " " 'On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' " [Citation.] In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." [Citation.] We may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling. [Citation.]' [Citation.]" (*Ward v. Tilly's, Inc.* (2019) 31 Cal.App.5th 1167, 1174.)

2. Exhaustion of Administrative Remedies

" 'In general, a party must exhaust administrative remedies before resorting to the courts. [Citations.] Under this rule, an administrative remedy is exhausted only upon "termination of all available, nonduplicative administrative review procedures." [Citations.]' [Citations.]" (*Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1267–1268.) " 'Exhaustion of administrative remedies is 'a jurisdictional

prerequisite to resort to the courts.' [Citation]." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321.)

"[E]xhaustion is a judicially-created rule of procedure" (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 134) that has "evolved by the courts …." (*Patane v. Kiddoo* (1985) 167 Cal.App.3d 1207, 1214.)

3. Exhaustion Excused when Administrative Remedy is Wholly Lacking

However, "the exhaustion requirement is inapplicable where an effective remedy is *wholly* lacking [citation] …." (*County of Los Angeles v. Farmers Ins. Exchange* (1982) 132 Cal.App.3d 77, 86.) "To be adequate, a remedy must afford the individual fair procedure rights." (*Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1128.) "The concept of 'fair procedure' does not require rigid adherence to any particular procedure, to bylaws or timetables. [Citation.]" (*Id* at p. 1129.) At a minimum, fair procedure requires adequate notice of the administrative action proposed or taken, and a reasonable opportunity to be heard. (*Ibid*.; see also *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 740–741 (*Payne*).)

Appellant argues his administrative remedy was inadequate because Personnel Rule 1060 does not specify a standard of review, burden of proof, scope of record, whether witnesses, briefs, or oral argument will be permitted, and whether the Board of Supervisor's decision will be written. Appellant argues Personnel Rule 1060 does not provide "clearly defined machinery" for appealing the Appeals Board decision. We think appellant misunderstands the "clearly defined" requirement for administrative remedies.

In *Rosenfield v. Malcolm* (1967) 65 Cal.2d 559 (*Rosenfield*), the Supreme Court held that the mere fact that an official body retains a continuing supervisory or investigatory power does not, in itself, constitute an adequate administrative remedy.

The statute or regulation[2] under which the body's power is exercised must "establish[] clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties." (*Id.* at p. 566.)

The cases *Rosenfield* primarily relied upon involved administrative schemes that were not just undetailed, they were fundamentally lacking. In *Henry George School of Social Science of San Diego v. San Diego Unified School Dist*. (1960) 183 Cal.App.2d 82, the administrative scheme had no "provision as to just what a citizen must do" in order to pursue claims administratively. (*Rosenfield, supra,* 65 Cal.2d at p. 566.) In *Martino v. Concord Community Hosp. Dist.* (1965) 233 Cal.App.2d 51, the administrative scheme's regulations were " 'devoid of *any* mention of the procedure to be followed ….' " (*Rosenfield, supra,* at p. 567, italics added.) And *Rosenfield* itself involved a county charter that "does not so much as suggest that an individual aggrieved by illegal departmental action may invoke that power on his own behalf; it provides *no* procedural machinery which would enable him to do so … [and] it is not even clear that the commission can correct an abuse which … it may happen to uncover." (*Rosenfield, supra,* at p. 568, italics added.)

Thus, under *Rosenfield,* it would have been an insufficient remedial scheme if appellant's sole redress was to invoke the Board of Supervisor's general authority over the county's employment-related decisions. More is required. There must be a procedure by which appellant can present his individualized grievance for consideration to a decision-maker empowered to offer relief.

Personnel Rule 1060 satisfies these requirements. The rule sets forth how to invoke administrative review: a party may submit a written request for review within 10

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[2] Administrative remedies/procedures may be established by statute, regulation, local ordinance, or other codes of written law. Here, the administrative remedy at issue is established by a county personnel rule. For readability, we will refer to the provisions authorizing an administrative procedure/remedy – whether those provisions are found in a statute, regulation, ordinance or elsewhere – as the "authorizing statute."

working days from the date of the Personnel Appeals Board decision. The rule explains when the request will be considered: at the "next regularly scheduled meeting" of the Board of Supervisors or at a hearing "that is mutually acceptable to both parties." And the rule makes clear the decision maker has the power to offer an adequate remedy: The Board of Supervisors' decision "shall be … binding." The fact that the rule does not spell out the finer details identified by appellant (e.g., a standard of review, burden of proof, scope of record, whether witnesses, briefs, or oral argument will be permitted, and whether the Board of Supervisor's decision will be written), does not render the remedy "inadequate."

4. Other Court of Appeal Opinions

We do not read *Rosenfield* as requiring the authorizing statutes to spell out more granular details like the standard of review, burden of proof, whether the decision will be written, etc. We acknowledge that our view of *Rosenfield* is in tension with language from other appellate decisions.

In *Unfair Fire Tax Com. v. City of Oakland* (2006) 136 Cal.App.4th 1424 (*Unfair Fire Tax*), the First District Court of Appeal deemed inadequate a "nebulous" administrative remedy that left "important questions unanswered" like "when an appeal must be filed, when it must be heard by the city council, what standard the city council should be applying in reconsidering the decision … what right the appellant may have to present evidence, or when the city council must resolve the appeal." (*Id.* at p. 1430.) In *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210 (*City of Oakland*), the Court of Appeal faulted the administrative scheme for not providing "procedures regarding how to request a hearing, no timelines when such a hearing will be held or concluded, and no standards for decisionmaking." (*Id*. at p. 237.) In *Plantier v. Ramona Municipal Water Dist.* (2017) 12 Cal.App.5th 856, review granted

September 13, 2017, S243360 (*Plantier*),[3] the Court of Appeal said that a "policy that only provides for the submission of disputes to a decision maker without stating whether the aggrieved party is entitled to an evidentiary hearing or the standard for reviewing the prior decision is generally deemed inadequate. [Citation.]" (*Id.* at p. 866.)

We have several observations. First, we note that Personnel Rule 1060 actually has some (though not all) of the attributes that were lacking in *Unfair Fire Tax* and *City of Oakland*. Personnel Rule 1060 specifies how and when the request for review must be filed (i.e., in writing, within 10 days), and when it will be heard by the decisionmaker (i.e., at the next regularly scheduled Board meeting or another mutually acceptable meeting). (See *City of Oakland, supra*, 224 Cal.App.4th at p. 237 ["there are not procedures regarding how to request a hearing, no timelines for when such a hearing will be held or concluded…"]; *Unfair Fire Tax, supra*, 136 Cal.App.4th at pp. 1424, 1430 ["the provisions leave important questions unanswered; they do not specify when an appeal must be filed, when it must be heard by the city council…"].)

Second, we can see why an appellate court would require more specificity when there is only a single "layer" of administrative review. In such circumstances, all requirements of procedural fairness must be satisfied in that single process. In other words, the adequacy of the entire scheme rises and falls with the sufficiency of that single layer of administrative review. Consequently, if the authorizing statute does not specify whether the party will be able to present evidence, for example, then it is necessarily unclear whether the party will *ever* be able to present evidence in the entire administrative process. It is reasonable for courts to be skeptical that such an administrative scheme is adequate. (See *Payne, supra*, 130 Cal.App.4th at p. 740–741 [administrative scheme must provide the affected party "a right to be heard."].) Here, however, the administrative scheme clearly provided appellant an opportunity to be

[3] Review of this case has been granted by the Supreme Court. (Cal. Rules of Court, rule 8.1105(e)(1)(B).)

heard: the evidentiary hearing before the Personnel Appeals Board. At that hearing, appellant "appeared with counsel, witnesses testified under oath and subject to cross-examination, documentary evidence was offered, and a stenographic record was made by the County." Because the administrative scheme provided appellant an opportunity to be heard and submit evidence before a decision maker (i.e., the Personnel Appeals Board), it was not required to provide yet another evidentiary hearing before the Board of Supervisors. Thus, the lack of specificity as to whether the Board of Supervisors' consideration would involve another evidentiary hearing or, instead, would proceed on the record created before the Personnel Appeals Board, is not dispositive as to whether the overall administrative scheme satisfied procedural due process.

Third, we believe it imprudent and unnecessary to require that every granular detail of administrative review be established with the broad brush of "statutory" language. Many of the aspects identified by appellant may be case-specific or otherwise ill-suited to codification. For example, the "burden of proof" with respect to one type of claim may be different from another. It does not seem practical to require that such issues – with all their variances, caveats, and exceptions – be addressed by the authorizing statute. Rather, the administrative scheme may provide (or its silence on the issue may effectively require) that parties must argue to the administrative decision-maker as to which standard of review or burden of proof should apply. And even if it were practical and desirable for the authorizing statute to set forth such details, we cannot say their absence renders the administrative scheme wholly lacking. "To be adequate, a remedy must afford the individual fair procedure rights [Citation.]…. The concept of 'fair procedure' does not require rigid adherence to any particular procedure, bylaws or timetables." (*Payne*, *supra*, 130 Cal.App.4th 729, 741.)

II. Personnel Rule 1060 Does not Contemplate "Reconsideration" Under Supreme Court Authority Because the Personnel Appeals Board and the Board of Supervisors are Separate Entities

Appellant next argues he was not required to seek review by the Board of Supervisors because that remedy is the functional equivalent of seeking reconsideration of a prior decision under *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489 (*Sierra Club*). In that case, the Supreme Court held that a party need not "file pro forma requests for reconsideration raising issues already fully argued before the agency, and finally decided in the administrative decision" in order to exhaust administrative remedies. Appellant relies on *Sierra Club* and argues that Personnel Rule 1060 "simply provided [him] with the option to raise, for a second time, the same evidence and legal arguments that been previously raised before …."[4]

Appellant concedes that the Board of Supervisors is not the same entity as the Personnel Appeals Board. Nonetheless, appellant argues that the "legal principles, theories, and issues" addressed in *Sierra Club* apply here. But the "legal principles, theories, and issues" in *Sierra Club* all revolved around seeking reconsideration by the *same* decision-maker. *Sierra Club* noted:

> "Over 50 years ago, the United States Supreme Court suggested that: "motions for rehearing before the *same* tribunal that enters an order are under normal circumstances mere formalities which waste the time of litigants and tribunals, tend unnecessarily to prolong the administrative

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[4] In a related contention, appellant suggests Personnel Rule 1060 merely provides for an "optional" remedy of review by the Board of Supervisors. However, administrative remedies must be exhausted, even when they are "couched in permissive language." (*Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 982; see also *Marquez v. Gourley* (2002) 102 Cal.App.4th 710, 713–714.)

Appellant seeks to distinguish the case *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, on its facts. While that case does present a different factual situation, we agree with its legal conclusion that "nothing in *Sierra Club*…abrogates the well-settled principle that where an administrative remedy is available, even if couched in permissive language, it must be exhausted before turning to the courts." (*Id.* at p. 735.)

> process, and delay or embarrass enforcement of orders which have all the characteristics of finality essential to appealable orders." [Citations.] *We agree*." (*Sierra Club, supra,* 21 Cal.4th at p. 503, italics added.)

Despite a clear basis for distinguishing *Sierra Club,* appellant insists that it establishes that he was not required to "raise, for a second time, the same evidence and legal arguments … previously raised." But that formulation leaves out an essential part of the *Sierra Club* decision. *Sierra Club* eliminated the requirement that a party raise, for a second time, the same evidence and legal arguments *before the same decision-maker.* We see no reason to extend that holding here.

III. The January 27, 2016, Letter from Kings County to DSA's Counsel Does Not Establish Exhaustion of Remedies

A. Background

Appellant's final contention concerns Code of Civil Procedure section 1094.6 and the January 27, 2016, letter from Kings County to DSA's counsel. The body of that letter reads, in full:

> "Attached you will find a copy of the official decision of the Appeals Boards regarding the above-referenced hearing.
>
> "Notice to the Parties: Decisions of the Appeals Board are final and binding unless appealed in accordance with section 1060 of the Personnel Rules, which has been included for your reference. The time within which either party may seek judicial review of this decision is governed by Section 1094.6 of the California Code of Civil Procedure.
>
> "If you have any questions, please contact me at [phone number.]"

Code of Civil Procedure section 1094.6, subdivision (b) provides that a litigant must file a petition for a writ of mandate under that section "not later than the 90th day following the date on which the decision becomes final." (Code Civ. Proc., § 1094.6, subd. (b).) Subdivision (f) of the same section requires that the local agency provide notice "that the time within which judicial review must be sought is governed by this section." (Code Civ. Proc., § 1094.6, subd. (f).)

B. Analysis

Appellant argues:

> "Appellant filed his Petition for Writ of Mandate pursuant to Code of Civil Procedure section 1094.5 within (90) days from January 27, 2016, the date in which Respondent issued notice to Appellant pursuant to Code of Civil Procedure section 1094.6. Therefore, Petitioner exhausted his administrative remedies."

This contention is a nonsequitur with an erroneous conclusion. The fact that appellant complied with the statutory 90-day filing deadline does not mean appellant exhausted his administrative remedies. They are two different prerequisites. Appellant cites no authorities that suggest otherwise, and we reject the argument.[5]

DISPOSITION

The judgment of dismissal is affirmed. Respondents shall recover appellate costs.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

_____
DETJEN, J.

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PEÑA, J.

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[5] Appellant suggests the letter was an "admission" that he exhausted his administrative remedies and could seek judicial review of the Appeals Board decision. Though appellant avoids characterizing it as such, this is an argument based in estoppel. " 'The essence of an estoppel is that the party to be estopped has by false language or conduct "led another to do that which he [or she] would not otherwise have done and as a result thereof that he [or she] has suffered injury." [Citation.]' [Citation.]" (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1315.) However, the doctrine does not apply to the government except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy. (*Ibid*.) We find no such circumstances here.